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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-54

CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

FANCHON BLAKE, *et al.*, *Respondents.*

CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

UNITED STATES, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Supplemental Brief of Respondents Fanchon Blake, et al., in Opposition.

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I
Introduction.

Pursuant to Supreme Court Rule 24(5), this Supplemental Brief is filed to bring to this Court's attention the fact that Defendant-Petitioner City of Los Angeles ("Petitioner City") very recently has made legal and factual assertions in the District Court below relevant to the ripeness of this case for review by this Court. These assertions made below are *precisely and unequivo-*

cally inconsistent with *crucial and central* arguments and assertions made by Petitioner City to this Court in support of its Petition.

Respondents Fanchon Blake, *et al.* ("*Blake* Respondents") do not bring these facts to this Court's attention for purposes of embarrassing Petitioner City or its attorneys. Rather, this Supplemental Brief is filed because Petitioner City's arguments and assertions recently made in this case to the District Court below show beyond any question whatsoever the validity the contentions previously made by the *Blake* Respondents in their brief in opposition to the petition for certiorari, dated August 10, 1979. Petitioners' arguments below also show the patent invalidity of the Petitioner City's arguments and assertions made to this Court in its Petition for Certiorari and in its Reply Brief in support of that Petition.

II

Factual and Procedural Background.

In a decision herein dated May 2, 1979 and reported at 595 F.2d 1367, the Ninth Circuit Court of Appeals ruled that Petitioner City's employment practices in effect prior to July, 1973 violated both Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* and the Fourteenth Amendment to the United States Constitution. As to the post July, 1973 practices, the Court of Appeals ruled that the District Court in this action had improperly granted a motion for summary judgment for the defendants and remanded the case for proceedings consistent with the appellate opinion.

On or about July 12, 1979, Petitioner City filed a petition for certiorari in which Petitioner City an-

ticipated arguments concerning the ripeness of this case for review to be made by the *Blake* Respondents and Respondent United States in the companion case. More particularly, in the Petition it was vigorously and repeatedly argued that although major aspects of the case were not at final judgment, and indeed had been remanded for trial, the Supreme Court nevertheless should grant certiorari because the "legal standards" set forth to be applied on the remand were "fundamental" to the subsequent proceedings, and because those standards were "impossible to meet" and "appear to signal the deathknell of this action." (Petition, pp. 18-19.)

In response to these arguments, in a brief submitted to this Court on or about August 10, 1979, the *Blake* Respondents argued that the case was not ripe for review despite the "deathknell" contentions of the Petitioner City. Citing *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967), the *Blake* Respondents' basic contention was that the case was not ripe for review until the Courts below had had a trial on the merits and applied the legal standards enunciated by the Court of Appeals to the facts as found by this District Court. It further was pointed out that until findings of fact had been made, this Court would be required to sift through a record which literally exceeds 10,000 pages in order to make meaningful determinations in this case.

In a reply brief filed in September, 1979, the Petitioner City characterized the *Blake* Petitioners' ripeness arguments as "specious." (Reply Brief, p. 4.)

In the meantime in June, 1979 the *Blake* Petitioners (Plaintiffs below) filed a motion for a preliminary injunction in the District Court. That motion was heard

by the District Court on December 17, 1979 and denied on December 18, 1979. The denial by the District Court is now on appeal.

The *Blake* Respondents submit the instant brief in order to put before this Court certain relevant statements and arguments made by Petitioner City (Defendant below) in opposition to the motion in the District Court for a preliminary injunction. In summary, all of these statements and arguments made by Petitioner City are to the effect that the Ninth Circuit's opinion is not the "deathknell" of this action, that the standards set forth by the Ninth Circuit will not be "impossible to meet" and, indeed, that at a trial on the remand the standards set forth in the Court of Appeals decision in reality are not "legal standards" to be followed by the District Court.

III
"Deathknell" Arguments.

In the Petition for Certiorari Petitioner City stated as follows at page eighteen:

> "In holding that the City had not met this burden of proving the lawfulness of its height requirement and physical abilities test, the Circuit Court in *Blake adopted a standard of proof* for employers which will be impossible to meet. That burden appears to signal the deathknell of this action. . . ." (Emphasis added.)

Similarly in its Reply Brief filed in September, 1979, Petitioner City argued as follows at pages seven and eight:

> ". . . [I]t is critical to focus on the actual substance of the Circuit Court's decision. . . .

> [T]he Circuit Court discussed in detail the legal standards it considered applicable to this case and *concluded* that the evidence presented by the City was insufficient to demonstrate the business necessity for its post-1973 selection devices. . . . Such an opinion lends little, if any, support to the claim that this case is not ripe for review." (Emphasis in original.)

In precise contradiction to the above-quoted statements to this Court, it was argued as follows at pages seven through nine of Petitioners recent Memorandum submitted below in opposition to the motion for a preliminary injunction ("Petitioners' Memorandum below"):

> *"Little Likelihood of Prevailing as to Post 1973 Use of Challenged Selection Devices*
>
> "The City has consistently argued that the basically interlocutory nature of this case would not prevent the United States Supreme Court from being able to engage in a meaningful review of the legal issues discussed at length by the Ninth Circuit Court of Appeals. But *this does not mean that the City has in any sense conceded that the Plaintiffs have, by virtue of the Ninth Circuit opinion, prevailed on the overriding issue* of whether the City's selection devices are so manifestly job related as to constitute a business necessity.
>
> * * *
>
> "The starting point for determining whether the Plaintiffs have met their heavy burden of demonstrating a likelihood of success on the merits is certainly the evidence previously filed in this action. . . . *Suffice it to say that the City contends that the evidence it has already introduced is*

compelling enough that it should not be concluded that the Plaintiffs even have a fair chance of ultimately prevailing." (Emphasis added.)

The *Blake* Respondents submit that since the Petitioner City's position now is that "it should not be concluded that the Plaintiffs *even have a fair chance* of ultimately prevailing," their prior arguments, that "the Circuit Court's legal standards appear to signal the deathknell of this action" and "will be impossible to meet," are arguments which should be rejected by this Court in its consideration of the ripeness of this case for review.

IV

"Fundamental Legal Standards" Arguments.

In its Reply Brief to this Court, Petitioner City argued as follows at pages four through seven:

> "The Respondents' principal point is that this case technically involves a non-final judgment because the Circuit Court remanded the matter, and therefore, it is not ripe for review. But the phrase, 'remanded for further proceedings' is not magical, and its utterance certainly does not per se preclude review. This Court has long held that the absence of finality will not foreclose it from reviewing a case where the issues presented are 'fundamental to the further conduct of the case.' *Land v. Dollar*, 330 U.S. 731, 734, n.2 (1947). . . .
>
> * * *
>
> "There is no doubt that the issues raised here *call into question the very legal standards* which have been applied to the extensive evidentiary record in this case and *which would have to be followed if the case was simply returned*

> *to the trial court* without further review. Thus, those issues are *clearly fundamental* to the further processing of this case. . . .
>
> * * *
>
> "That this case is now ripe for review is further underscored by the fact that neither the District Court nor the Circuit Court had any difficulty in dealing with the factual record in this case. Contrary to the suggestions of the Respondents, neither of the lower courts expressed the view that there were remaining disputes as to material facts in the current record which could pose obstacles to meaningful review." (Emphasis added.)

Despite the unequivocal nature of the above-quoted statements made to this Court, in the District Court in Petitioners' Memorandum below it recently was stated as follows at page eight:

> "As is commonplace in this often complex and highly technical area of the law, the Plaintiffs [in the Court of Appeals] raised a number of criticisms regarding the evidence produced by the City. As is proper when reviewing a summary judgment, *the Appellate Court basically considered only the arguments made by the Plaintiffs* and viewed all of the extensive evidence in the record in the light most favorable to the Plaintiffs, and thereby concluded that, for purposes of a summary judgment, the height requirement and physical abilities test have not been shown to be justified by business necessity. (*See, Blake* opinion, p. 2, lines 12-16; p. 16, lines 3-17; p. 22, lines 29-32; and p. 24, lines 1-4.) *Obviously, this* [District] *Court would not assess the evidence presented according to such uneven standards of review.*

Moreover, the City contends that a balanced examination of the evidence already filed and the evidence submitted herewith should persuade this Court that the facts are such as to establish that the challenged selection devices are so closely job related as to constitute a business necessity." (Emphasis added.)

The *Blake* Respondents submit that since the Petitioner City's position *presently* is that a "balanced examination" of the facts upon the remand will "establish that the challenged selection devices are so clearly job-related as to constitute a business necessity," this case is hardly ripe for review on the ground that, as Petitioner City previously argued to this Court, there are no "remaining disputes as to material facts." The *Blake* Respondents further submit that since Petitioner City's position presently is that the Ninth Circuit in its opinion did not set forth "legal standards," but rather "considered only the arguments made by the Plaintiffs," this case is hardly ripe for review on the ground that, as Petitioner City previously argued to this Court, the "legal standards" set forth in the Ninth Circuit Opinion "are fundamental to the further conduct of the case."

V
New Evidence.

Before the District Court below, Petitioner City recently has submitted evidence on the issue of the job-relatedness of its employment selection devices which was not before the Court of Appeals and is not in the record before this Court. In Petitioners' Memorandum below, this new evidence was described in detail at pages nine to eleven. At the conclusion of

this description, Petitioner City stated as follows at page eleven:

> "Based upon the evidence already in the record *as well as the evidence produced in response to this motion,* the City contends that the Plaintiffs have clearly failed to meet their heavy burden of showing that they are likely to prevail on the merits. This Court should find that in light of the material presented to date, *the Plaintiffs' criticisms of the City's evidence are more apparent than real,* and that the City's evidence clearly appears to establish that the height requirement and physical abilities tests are so manifestly job related as to constitute a business necessity." (Emphasis added.)

The "new" evidence as to job-relatedness and business necessity filed in the District Court constitutes several purported validation studies and other evidence not in the Record on Appeal. These purported validation studies and other new evidence submitted to the District Court are voluminous.

Although the *Blake* Respondents believe the new validation evidence to be inadequate as a matter of law, the fact that Petitioner City has done what purports to be new validation work which is not before this Court means that if this Court were to take the case, it would be rendering an advisory opinion. This is the case because without the new evidence being in the record, the decision of this Court cannot be based upon the complete record in this case and thus would not be dispositive of the case. The *Blake* Respondents further would point out that it would not be practicable to make the new evidence part of the record before this Court for the simple reason that the new evidence

has not yet been reviewed or considered by the Court of Appeals or, indeed, as a final matter by the District Court.

VI
Blake Respondents' Position Regarding Ripeness for Review.

The *Blake* Respondents wish to make it clear that they do not agree with all of the extreme positions taken by Petitioner City in the District Court as to the meaning of the Court of Appeals decision herein or the likelihood that Respondents ultimately will succeed on the merits. The *Blake* Respondents nevertheless submit that the positions taken below by Petitioner City show that the *Blake* Respondents were entirely correct in their arguments as to ripeness made in their Brief filed in August, 1979 in opposition to the Petition for Certiorari. In that Brief it was pointed out that:

(a) In the absence of findings of fact and an application of those facts to the relevant legal principles as a final matter, meaningful review is not possible at this juncture of the case because this Court would be deciding legal issues in a vacuum;

(b) The basic argument made in the Petition for Certiorari, to wit that the "legal standards" in the Ninth Circuit opinion are "impossible to meet," is at this juncture completely unsupported as a factual matter by the record as it now stands;

(c) A review by this Court should await introduction of any new evidence of job-relatedness which might be introduced in the District Court below;

(d) A review by this Court at this juncture would require the nine Justices of this Court to sift through the undifferentiated mass of evidence

in the Record on Appeal which exceeds 10,000 pages in length.

The *Blake* Respondents also would point out that, unlike the Petitioner City, there is no inconsistency between their positions taken in this Court and their positions before the District Court on the motion for a preliminary injunction. All that was argued below was that, considering the balancing of hardships and the likelihood of success on the merits, the represented class is entitled to a preliminary injunction pending trial and final judgment. There is nothing inconsistent in that argument with the argument that the Supreme Court of the United States should not review a case which has not been to trial, in which there are no findings of fact, in which the Supreme Court would be required to decide legal issues in a vacuum, and in which the Supreme Court would have to review a massive record on appeal.

VII
Conclusion.

The *Blake* Respondents respectfully submit that any doubts there may have been as to whether this case is ripe for review in its present posture are dispelled by the positions taken and arguments made so recently by Petitioner City in the District Court.

Respectfully submitted,

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